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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 227

ANTONIO CORALLO,
Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF PETITIONER ANTONIO CORALLO TO UNITED STATES' BRIEF IN OPPOSITION

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Petitioner Antonio Coralllo, makes the following reply to the Brief of the United States in Opposition.

1. It is the position of the petitioner that the circumstances under which the jury conducted its deliberations did not permit the free and untrammeled consideration to which the petitioner is entitled.

The Government in its Brief in Opposition (p. 12) states that no one disputed "the judge's assumption that the jurors had not answered any questions." The important facts are that the jurors were subjected to an oppressive atmosphere during its deliberations and unjusti-

fied contacts were had with the jurors during their deliberations. The reason nothing is known about the content of the communications to the jurors, or whether the jurors had answered any questions, is that the trial judge—in making an assumption contrary to the presumption of prejudice—failed to take the necessary steps to rebut the presumption of prejudice.

Of course the communications were not the *same* "as those involved in *Remmer* v. *United States*, 347 U. S. 227." But the assertion that the communications here involved were not "private" is merely a play upon that word. Indeed, the communications were private since they were addressed to the jurors, not to the public.[1] What took place here having newspapermen, "running along besides the jury asking questions," is not justified, as the Government argues, merely because "of the public position of one of the defendants."

Petitioner contends that *all* communications had with the jury during its deliberations are forbidden, except those of an official nature. It was the duty of the court to determine, by hearing or inquiring of the jurors,

1. There is a distinction between public communications which the jury might read or hear during trial and communications during the jury's deliberations, when the jury is in the custody of the Government to assure freedom from *all* communications public or private. Cf. *Near* v. *Cunningham*, 313 F. 2d 929, 933 (4th Cir. 1963), citing *Stone* v. *United States*, 113 F. 2d 70 (6th Cir. 1940), wherein the Court said: "* * * The presumption is always in favor of good character but the law concerning juries provides strictly that all jurors be secluded from outside influences and presumes that such influence may act upon some of them, and may act so as to be beyond detection. Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained."

whether prejudice did *not* result, particularly in the circumstances of this case, where the trial judge found it necessary to have a side entrance opened for his own use (437a). The test for a hearing is not simply whether undue pressure has been exerted on the jury. This is not a case, like *United States* v. *Catalano*, 231 F. 2d 67, 68 (2d Cir. 1956), cited by the court below, where the subject matter of the "talk" was reported. Here, there "is no certainty that no harm has been done." *United States* v. *Campagna*, 146 F. 2d 524, 528 (2d Cir. 1944). Hence, the presumption of prejudice applies although ignored by both the court below and the Government.

2. The trial judge did not, *in his charge*, limit Moore's testimony as to his grand jury statement to the issue of Moore's credibility (Br. in Opp., 15). The trial judge specifically stated that Moore acknowledged before the grand jury certain statements attributed to Corallo. This could not be other than a reference to this *as evidence*, contrary to the assertion of the Government (Br. in Opp., 16). And because it was not evidence the trial court should not have told it to the jury in its charge. Thus the jury had improperly placed before it two prejudicial items: (1) Moore's testimony before the Grand Jury; (2) Moore's testimony that he had no recollection at the trial of what he had acknowledged before the Grand Jury. This was especially prejudicial in view of the trial judge's statement that he would "again refer to the matter" (369a). When the trial court "again" referred to this matter in its charge, it referred to the inconsistencies among the two Government witnesses, at the trial, Erdman and Moore. But this only emphasized the improper reference

to Moore's Grand Jury testimony to the obvious prejudice to the petitioner.

Accordingly, petitioner submits that his petition for a writ of certiorari should be granted.

Respectfully submitted,

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